

1421050 (Migration) [2016] AATA 3516 (8 March 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr RAJVIR SINGH
CASE NUMBER:	1421050
DIBP REFERENCE(S):	BCC2014/3325264 CLF2012/229259
MEMBER:	Rieteke Chenoweth
DATE:	8 March 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 08 March 2016 at 4:55pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 4 December 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 19 November 2012 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820. 211(2)(a) because the delegate was not satisfied that the applicant and the sponsor were in a genuine and continuing relationship.
4. The applicant appeared before the Tribunal on 29 February 2016 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Patricia Rambler, the sponsor, Ms Sukhvir Kaur, the applicant's sister and Ms Patsy Lewis, the sponsor's niece.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant and the sponsor are in a genuine and continuing relationship.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 17 September 2012. There is a copy of the marriage certificate on the Department file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. Before the hearing the migration agent for the applicant submitted a number of additional documents as follows:
- Photos of the couple together and with others.
 - Rental receipts for 2013 and 2015.
 - Utilities receipts in joint names for accounts in 2013, 2014 and 2015.
 - ANZ bank account for periods in 2013, 2014 and 2015.
 - Statutory declaration from Mr Jagmohan Singh, the brother-in-law of the applicant attesting to the relationship being genuine.
 - Statutory declaration by Ms Sukhvir Kaur, the applicant's sister attesting to the relationship being genuine.
 - Statutory declaration by Mr Harpreet Singh, friend and work colleague of the applicant attesting to the relationship being genuine.
 - Statutory declaration by Ms Patsy Lewis, the sponsor's niece attesting to the relationship being genuine.
 - Statutory declaration by Mr Waheed Hussain, the applicant's employer.
 - Statutory declaration by the sponsor.
 - Statutory declaration by the applicant
12. The applicant told the Tribunal that he came to Australia in 2008 as a dependent spouse on his ex-wife's student visa. He lived in Brisbane but he found it hard to find work there so in March 2010 he moved to Alice Springs where he obtained work as a taxi driver. He continued to support his ex-wife financially until about mid-2011 when she told him she was involved with another man. He then stopped supporting her financially and she filed for divorce. They were divorced on 8 September 2012. He said there was considerable tension between them at the time of the separation. He said he does not know why the marriage did not work and he does not know what she said in Court. His family were angry at her because of the divorce. He said he has not spoken to her since they were separated. He said that she had tried to ring him in the last 6 months but he had told her he did not want to have any contact with her and had hung up.
13. *Financial aspects of the relationship*
14. The applicant told the Tribunal that he met his wife, the sponsor in this application, in a shopping mall in Alice Springs. She was standing outside a shop and they started talking.

He said she was very shy but they started talking about her life and he told her that he drove a taxi. They went to McDonald's and had a meal together.

15. The applicant said that at the time they met, his wife was working in child care. She stopped working in 2014 because she was not well. He said that she had problems with her lungs.
16. The applicant said he is working as a taxi driver, earning between \$700 and \$800 per week and he supports his wife financially. They have a joint bank account but as he is paid in cash he pays for food and expenses in cash. He said however, that he is now not able to pay the rent in cash. They live in a 3 bedroom house with his sister and her husband and children and at present his mother, who has come to Australia to help his sister with a new baby, is also living with them.
17. The applicant said that if his wife wants to buy anything she asks him for money and he gives it to her. She goes to the Casino about 3 times a week and he gives her money to spend there. He thought she lost about \$100 to \$150 per week at the Casino. She also does some work as a painter and gets some small amounts of money when she sells a painting. He thought she earned about \$50 to \$100 for paintings except for her smaller paintings which were sold for less. He thought she sometimes owed money to the art dealer who sells her paintings but did not know how much she ever owed him.
18. The sponsor gave evidence that when she wants to buy something she asks the applicant for money. She sometimes buys some food for the household. If she wants something such as shoes or a dress he gives her the money.

19. *Nature of the household*

20. The applicant told the Tribunal his sister and his mother do the cooking in the household. He and his wife do some of the cleaning and his wife cleans his clothes. His wife does not do any of the cooking but makes tea for herself. He said his wife likes to eat Indian food now. The sponsor also said that she had initially not liked curries but now enjoyed eating them. She gave consistent evidence that she and the applicant did some of the cleaning in the house and also in the yard.
21. The applicant's sister who gave evidence at the hearing said she and her mother did the cooking and the applicant and sponsor helped with the cleaning of the house. She also said that at the site visit she had shown the officers of the Department the mail addressed to the sponsor in the bedroom because that was what they had asked about.

22. *Social aspects of the relationship*

23. The applicant submitted a number of additional photos depicting the couple at their wedding and in social situations with other people. The Tribunal notes there are a number of statutory declarations attesting to the relationship being genuine.
24. In the decision record the delegate noted that there was little evidence of the couple attending social gatherings, holidays or short breaks together. The delegate noted that at the time of the site visit there were few personal belongings of the sponsor in the bedroom. The applicant said that he and his wife had few photographs and that they did not put them up on the walls of their room because it was a rented house. He said that his wife's clothes were lying on the floor of the cupboard at the time because that was how she always left her clothes. He said she only had a few clothes and when needed she went out and bought others. The applicant submitted additional photos of the couple together with other members of her family. The Tribunal notes that these photos are undated and appear to have been taken after the date of the decision record. It considers these photos could have

been taken and submitted as evidence in the light of comments made by the delegate in the decision record. Accordingly it puts limited weight on these.

25. *Nature of persons commitment to each other*

26. The Tribunal asked the applicant what had attracted him to the sponsor. He said that she was always smiling and was never angry. He said that when he was alone in Alice Springs after moving from Brisbane he was trying to make new friends and so he had stopped to talk to her in the shopping mall. The Tribunal put to him that his wife comes from a different culture and there is a 24 year age gap between them and asked them what he considered they had in common. He said that the 24 year age gap and the culture difference should not be a barrier to the relationship. He considered that these things were not important if you loved someone. The applicant was not able to say anything else which had attracted him to the sponsor. He did not comment on whether he had any involvement in her cultural activities.
27. The applicant said that he travels to India because he has a farm there which he leases out and he has to return to India to renew the lease. He also has a house there and he needs to check up on it because it was burgled last year. He has friends and relatives there that he likes to visit.
28. The sponsor told the Tribunal that she was attracted to the applicant because he was young. She could not think of any other reasons that she was attracted to him. She said she liked to talk to him about his life in India. She thought he liked to return to India because he wanted to visit his friends and relatives there. The Tribunal asked her if he had any property there and she said that she thought he owned a house. She did not mention the farm he claimed to own.
29. The applicant told the Tribunal that the things he and the sponsor had in common was that they both liked to stay at home and do not talk much. He liked the fact that she was nice all the time and was a helpful person. They both like to stay home and watch movies. He said they had different tastes in movies. He likes Hollywood and Bollywood movies and watches action movies but she does not like scary movies. She watches TV serials and football.
30. The Tribunal is not satisfied that the applicant and the sponsor have a significant knowledge of each other. It notes that they have been together since 2011 and it would expect that they could exhibit more detailed knowledge about each other.
31. At the hearing the applicant's sister said that in Indian society if a person married out of the caste without the permission of the parents they could be ostracised. She said that the fact that the applicant's mother had been living in the house with the family for the past year indicated that the sponsor was fully accepted by the family as being the spouse of the applicant.
32. The Tribunal asked the applicant about his previous marriage. He said he had come to Australia as a dependent spouse on his ex-wife's student visa. She was studying commercial cookery. He stopped sending her money in mid-2011 when she told him that she had a relationship with another man. He said that he was angry and upset by this and had not talked to her since that time. She had filed for divorce and he had no idea what she had told the Court. She had telephoned him about 6 months previously but he had refused to talk to her and hung up the phone.
33. The Tribunal asked the applicant if he had travelled to India in 2012. He was initially unsure but then said that he had gone to his sister's wedding in India. The Tribunal asked him if he

had travelled alone on the return journey. He said that he was alone. The applicant also said that the sponsor had never travelled to India because she was afraid of traveling by plane.

34. Under the provisions of s 359AA the Tribunal put to the applicant that there is evidence on the Department's movement records that on 12 March 2012 he returned to Australia and that his ex-wife had travelled on the same flight and they had booked in at the same time. He then said that his ex-wife had been invited to his sister's wedding and he had seen her there. He stated that although they had been on the same return flight they had not spoken to each other. His sister confirmed that the applicant's ex-wife had been invited to her wedding.
35. The Tribunal does not find this evidence to be credible. It notes that the applicant only modified his account of whether he travelled alone on the return flight when the evidence of his ex-wife's travel was put to him. It further notes that the applicant and the sponsor met on 16 September 2011 and commenced a relationship 2 months later. This indicates that they were in a relationship at the time of the applicant's travel to India in 2012. It considers it would be unlikely that the applicant's family would invite his ex-wife to his sister's wedding after an acrimonious divorce. The Tribunal does not find it credible that the applicant and his ex-wife would book in at the same time and not be travelling together. It does not find the applicant's evidence that he did not talk to his ex-wife credible.
36. The Tribunal accepts that the applicant and the sponsor are married. The Tribunal has considered the oral and documentary evidence that the applicant provided to the Tribunal as well as the evidence of the witnesses. It notes that while the sponsor's niece had travelled to the hearing to give evidence she found it too difficult to speak at the hearing. The Tribunal notes that there is little documentary evidence of a pooling of financial resources. The applicant accounted for this by his evidence that he is paid in cash and gives the sponsor money whenever she wants it. The Tribunal accepts there is some pooling of financial resources.
37. The Tribunal further accepts that the sponsor lives with the family and has done so since their marriage. The Tribunal is satisfied that the sponsor is committed to the marriage and sees it as a genuine and continuing one.
38. The Tribunal is not satisfied that the applicant is committed to the relationship with his wife to the exclusion of all others. It does not find his account of the acrimonious breakup of his relationship with his ex-wife and his claimed lack of contact with her since then to be credible.
39. The Tribunal further considers that in spite of the time the couple have been together they have little knowledge about each other and each other's interests.
40. The Tribunal is not satisfied that there is a mutual commitment to a shared life as husband and wife to the exclusion of all others or that the relationship is genuine and continuing.
41. Given these findings the Tribunal is not satisfied that at the time the visa application was made or the time of this decision the parties were in a spousal relationship.
42. Therefore the applicant does not meet cl.820.211(2)(a) and cl.820.221.
43. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

44. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Rieteke Chenoweth
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).